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IN THE

Supreme Court of the United States

October Term, 1960.

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. BERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of LESTER D. HAYES,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL.

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EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss the appeal taken herein from the final judgment of the Court of Appeals of the State of New York entered on May 19, 1960, on the ground that it does not present a substantial federal question and on the further ground that such judgment rests on an adequate non-federal basis.

Statement

This is a declaratory judgment. Under the New York practice it was necessary to have a trial on the merits and for the Court to declare the rights of the parties. See *Sylvander, et al., v. Taber, et al.*, 6 A. D. 2d 987.

After such decision the appellants herein served an amended complaint (which we, following the appellants' example, shall hereinafter call the "complaint"). There were seven alleged causes of action therein. In six of them, the first, second, third, fifth, sixth and seventh, the appellants alleged that Section 199 of the Insurance Law of the State of New York and the plan of mutualization adopted by Farmers and Traders Life Insurance Company pursuant thereto violated their rights under Article I, Section 10, of the Constitution of the United States and the taking of property without due process of law clause of the Fourteenth Amendment (see Appendix B to appellants' jurisdictional statement, page 31a*). In the fourth they alleged that the acts of appellees under the plan were *ultra vires*. Upon the amended answer to such complaint the case went to trial on December 30, 1958, before Honorable William E. McClusky, a Justice of the Supreme Court of the State of New York, without a jury. Practically all

* Page references are to pages of appellants' jurisdictional statement and the appendices thereto.

of the evidence consisted of stipulated facts and documentary evidence offered by the appellants. Mr. Justice McClusky, on April 15, 1959, rendered an opinion in favor of the appellees, 19 Misc. 2d 1005 (pp. 1a to 17a). Pursuant thereto a declaratory judgment declaring the rights of the parties as prayed for by the appellees and dismissing on the merits each of the seven alleged causes of action was entered on May 7, 1959 (pp. 18a to 25a).

On appeal by the appellants to the Appellate Division of the Supreme Court, Fourth Department, said judgment was unanimously affirmed without opinion, 9 A. D. 2d 1019 (pp. 26a to 27a). On appeal by the appellants to the Court of Appeals said judgment was unanimously affirmed without opinion, 8 N. Y. 2d 835 (pp. 28a to 30a).

On motion by the appellants to amend the remittitur to recite that federal questions were presented and necessarily passed upon, the Court of Appeals made on October 6, 1960 the following order:

> "ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following, viz:
>
> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Appellants contended that their contract obligations were impaired in violation of Art. I, §10, of the Constitution of the United States; and that their rights to due process of law under the Fourteenth Amendment of the Constitution of the United States were denied. The Court of Appeals held that there were no such violations and that there was no merit or substance to appellants' contentions" (p. 30a).

This case involved a consideration of many provisions of the present Insurance Law and the prior Insurance Law of the State of New York and the interpretation and construction thereof. The interpretation and construction

placed upon these statutes by the courts of the State of New York were such that, if any federal question remained, it was certainly not a substantial one as defined in subdivision (c) of Rule 15 of the Revised Rules of this Court.

Facts

The defendant corporation Farmers and Traders Life Insurance Company (hereinafter sometimes referred to as "Farmers and Traders" or "the Company") was incorporated under the laws of the State of New York and received its charter on July 12, 1912. The individual defendants who have been served or appeared herein are either (a) officers and directors of the Company, or (b) just directors, or (c) just officers.

At the time it was incorporated there were in existence, as shall be more fully pointed out hereafter, the statutes pursuant to which the plan of mutualization herein was adopted, and also pursuant to which everything that was done pursuant thereto was done, except for a single matter that will be pointed out hereafter. This sole exception, the so-called 1917 amendment, was merely an amendment to the statutes in existence in 1912 and was adopted by the Legislature pursuant to its reserved power to amend or alter charters in order to carry out the objectives and purposes of the statutes in existence at the time the charter was issued, which statutes now appear as Section 199 of the present Insurance Law.

Farmers and Traders was incorporated pursuant to Section 70 of the then Insurance Law (Sections 45 and 48 of the present Insurance Law). Similar provisions go back to Chapter 463 of the Laws of 1853.

In strict compliance with such Section 70, Article III of its certificate of incorporation provided:

"ARTICLE III.

"The kind of insurance to be undertaken is insurance upon the lives or health of persons, and every insurance appertaining thereto, and to grant, purchase or dispose of annuities, which kind of insurance is authorized under Subdivision 1 of Section 70 of the Insurance Law of the State of New York, being Chapter 33 of the Laws of 1909 known as Chapter 28 of the Consolidated Laws and the acts amendatory thereof and supplemental thereto" (II 203).*

The statement on page 6 of appellants' jurisdictional statement that the Company was incorporated "to engage in the business of writing non-participating life insurance policies" is incorrect. It was incorporated to write any and every kind of life insurance. Whether it would be by non-participating policies or participating policies was expressly left to the decision of the Board of Directors. Article IV of its certificate of incorporation, in strict compliance with Section 70, provides:

"ARTICLE IV.

"The mode and manner in which its corporate powers are to be exercised are as follows: The corporate powers of said company shall be exercised by a Board of Directors consisting of twenty-five persons, and by such officers and advisory boards as the said Board of Directors may, from time to time, empower and appoint" (II 204-205).

The Board of Directors elected to make and undertake insurance upon the lives of persons by issuing non-participating policies.

The judgment appealed from has declared:

"(r) That Farmers and Traders Life Insurance Co. now has, and at all times since its incorporation

* Reference is to folio number in Volume II of the record on appeal. Folio numbers in Volume I will be prefixed by the Roman numeral I.

in 1912 has had, the power, under and consistent with its Charter, to issue participating life insurance policies:

"(s) That Farmers and Traders Life Insurance Co. had, on Jan. 1, 1955, and at all times since its incorporation in 1912 had had the right and power under and consistent with its Charter, to at any time discontinue for the future issuing non-participating life insurance policies and commence issuing only participating life insurance policies;

"(t) That the issuance by Farmers and Traders Life Insurance Co of participating life insurance policies and deferred annuity and pure endowment contracts beginning on Jan. 1, 1955, and continuing thereafter, and the discontinuance by Farmers and Traders Life Insurance Co. of writing any new non-participating policies and contracts on and after Jan. 1, 1955, were and are within the powers granted to Farmers and Traders Life Insurance Co. by the State of New York;" (p. 23a).

We have considered these provisions of the certificate of incorporation and Section 70 of the former Insurance Law because of the provisions in the plan of mutualization that on January 1, 1955, Farmers and Traders should cease writing non-participating policies and thereafter write only participating policies. [3]See subdivision (g) of Article II of the plan of mutualization at page 128 of Volume II of record on appeal. Appellants in the State courts attacked such provision as *ultra vires* and unconstitutional. They are not complaining of or attacking such provisions in this Court. Their jurisdictional statement does, nevertheless, contain many erroneous and misleading statements of the effects of such plan of mutualization on their rights as stockholders of Farmers and Traders and of the effects which will result, according to appellants, from the fact that the Company ceased writing non-participating policies on January 1, 1955 and has been writing ever since only participating policies. We shall presently correct such statements.

The original capital of Farmers and Traders was $200,000, consisting of 2,000 shares of common stock of the par value of $100 each. In 1919 the capital was increased by $100,000, consisting of 1,000 shares of the par value of $100 each.

The plan of mutualization involved herein was adopted in strict accordance with the mutualization statutes, and particularly subsections 2 and 3 of Section 199. The Board of Directors duly approved the plan on May 15, 1954. The stockholders duly approved on July 19, 1954 by a vote of 2,467 shares out of a total of 3,000 shares outstanding in favor and 172 shares against. The policyholders duly approved on August 31, 1954. The Superintendent of Insurance on November 15, 1954.

We now relate the evidence as to when the named appellants acquired their Farmers and Traders stock. Saydee H. Terry is the record holder of 2 shares as of November 22, 1944. There is no evidence that Fred L. Eames is the owner of any shares. John O. Young is the holder of record of 74 shares as follows: 2 shares on January 19, 1934, 2 shares on November 26, 1937, 24 shares on November 28, 1949, 46 shares on April 15, 1953. When he acquired the last two blocks the market value of the stock was $210 to $220 per share. When he acquired the last block he knew of the intention to mutualize the Company. The plaintiff Margaret C. Sylvander is the record owner of 2 shares acquired on June 10, 1953. The plaintiff Earl C. Sylvander is the record owner of 79 shares, the first 11 shares being acquired on June 10, 1953, and the balance in blocks of different sizes on thirteen different occasions from October 1, 1953 to August 2, 1957. (This action was commenced on March 20, 1956.) On September 16, 1953, he learned about the plan to mutualize the Company. For the 29 shares acquired after February 1, 1954, he paid more than $1,000 per share.

Answering Statements on Pages 10 to Top of Page 12 of Appellants' Jurisdictional Statement

At top of page 10 of appellants' jurisdictional statement they state the plan deprives them of their "vested rights." This begs the very questions which appellants seek to present to this Court.

The quotation (p. 10) from the "prospectus" is quite out of order because the document quoted from is not in evidence (bottom p. 6a).

We have already shown that under statutes in existence when the Company was organized it had the right to switch at any time from issuing non-participating to participating policies. Such switch would be one step in the conversion of Farmers and Traders from a stock company issuing non-participating policies to a mutual company issuing participating policies.

We shall hereafter show that under the statutes in existence when the Company was organized it had the right to adopt a plan for the acquisition of its own stock as a further step in its conversion to a mutual company.

Every stockholder of Farmers and Traders acquired his stock subject to the right of the Company to switch at any time from non-participating policies to participating policies and subject to the right of the Company to adopt a plan to purchase its own stock. No stockholder had a "vested right" not to have the Company make the switch and not to have the Company adopt a plan to purchase its own stock.

Furthermore, as shall be more fully pointed out hereafter, every stockholder of Farmers and Traders has the right, under the plan of mutualization and under Section 199 and the predecessors thereof back to 1911, to elect, entirely in his own discretion, to retain his shares of

stock or to surrender them to the Company in accordance with the terms of the plan. See subdivisions (n) and (o) of judgment (p. 21a).

Appellants have elected to retain their shares. What are their rights as such stockholders?

The opinion of the learned Trial Justice states:

> "What is the property, if any, of which the plaintiffs have been deprived? Their shares entitled them to dividends, the right to vote at annual and special elections, and to an aliquot distribution of the net assets of the corporation upon dissolution. Section 199 aforesaid does not deprive them of any of those rights" (p. 30a).

After the policyholders had approved the plan, the Superintendent of Insurance granted the appellants' request for a hearing. Honorable Raymond Harris, Deputy Superintendent and Counsel of the Superintendent of Insurance, was authorized to conduct the hearing. He thereafter rendered his report to the Superintendent of Insurance, who approved the same. The appellants put in evidence the stenographic transcript of the hearings and a copy of Mr. Harris's report (Ex. S-10). On page 9 of the report appears the following:

> "• • • He (Mr. Sovik) also urged that since, upon adoption of the plan, the company would discontinue the issuance of non-participating insurance contracts and would issue only participating contracts, non-assenting stockholders would no longer be entitled to earnings of the company from new business.
>
> "Obviously, the concept that mutualization in any wise affects the equity of stockholders who do not surrender their stock under the plan is entirely incorrect and based upon a misconstruction of Section 199. That section does not require any stockholder to surrender his stock and the latter's rights as a stockholder remain unaltered while he

retains his stock. Since the rights of the stockholder who retains his stock after adoption of the plan remains unchanged, there is no legal basis for the contention that such stockholders are not entitled to share in the earnings from the new participating business written subsequent to the adoption of the plan."

The earnings of the Company prior to January 1, 1955, were good. They have been good since then. The accumulated net earnings as of December 31, 1953, were $2,019,121.80 (see definition of "Accumulated Net Earnings" in the plan and also line 30 of Liabilities on Ex. S-16). The Company's net gain for 1954 was $338,420.31 (line 28, Ex. S-16). The net gains or earnings from the non-participating business for the years 1955, 1956 and 1957 total $2,155,873.60. It is thus apparent that by December 31, 1957, the Company's earnings from the non-participating business were sufficient to pay the full mutualization price of $1,000 per share on all its 3,000 shares whenever all the stockholders elected to turn in their stock. Earnings from the non-participating business will continue at high levels for many years. It is true that there have been losses from the participating business. That was to be expected. These losses are decreasing each year. We wrote in our brief in the Court of Appeals that based on the evidence the participating business will be operating at a profit within ten years after January 1, 1955 and the losses in the early years will be completely wiped out. Up to December 31, 1957 stockholders owning 2,784 shares had voluntarily elected to surrender their stock to the Company and the Company, pursuant to the mutualization plan, had paid them $500 per share, for a total of $1,392,000. In spite of these payments and the initial losses in the participating business, the Company's surplus increased from $2,019,121.80 on December 31, 1953 to $2,273,485.18 on December 31, 1957. Payments on the mutualization price of $1,000 per

share are proceeding faster than anticipated in the plan. Once the full $1,000 per share has been paid to those who voluntarily turn in their stock and the corresponding surplus for the shares not turned in has been set aside (Article III of plan), the remaining earnings from the non-participating business will be available for dividend payments to all the 3,000 shares outstanding. If appellants believe that the directors are not paying dividends at a suitable rate, they can start an action to compel declaration of higher dividends. In the original complaint herein there was a cause of action to compel a declaration of a dividend of $400 per share. By stipulation that cause of action was omitted from the amended complaint without prejudice (I 411-414).

What is the value of plaintiffs' stock under the foregoing facts? That is purely a matter of opinion. It is known that in 1954, 1955, 1956 and 1957 plaintiff Earl C. Sylvander paid more than $1,000 per share.

The facts just stated are really irrelevant to the determination of whatever constitutional question there may be in this case. We have related them to correct misstatements in appellants' jurisdictional statement.

It must always be remembered that plaintiffs took their stock subject to the constitutional right of the Company to switch at any time from writing non-participating policies to writing participating policies and the constitutional right of the Company to adopt at any time a plan to purchase its own stock and, therefore, subject to whatever effect, good or bad, the exercise of such rights might have on their stock.

Legislative History of Section 199 of Insurance Law

Section 199 of the Insurance Law is derived from part of the legislation adopted in 1906 as a result of the report of the Armstrong Committee which, with Honor-

able Charles Evans Hughes as Counsel, had made an intensive investigation of life insurance companies in New York and rendered its report to the Legislature (Assembly Doc. No. 41, 1906). Among other statutes it proposed were ones designed to permit a stock life insurance company to convert itself into a mutual life insurance company. We have already indicated that under Section 70 a stock life insurance company could at any time by action of its Board of Directors change from writing non-participating policies to writing participating policies. The Committee therefore proposed legislation to permit a stock company to acquire its own stock and thus complete its mutualization. There were two principal reasons for such recommendations:

(1) the elimination of the evils attendant upon the control of a large stock life insurance company by a single individual ~~or a clique of a few~~ individuals through ownership of a majority of the outstanding stock which bore an insignificant relation to the total resources of the company;

(2) to allow, in the spirit of justice and fairness, the policyholders to participate in the profits of the company.

See Committee's report, page 374 and pages 380-382.

Pursuant to such recommendations the Legislature added Section 95 to the then Insurance Law. See Section 31 of Chapter 326, Laws 1906. This new Section 95 provided for the acquisition by the company of its stock pursuant to a plan approved by a majority of its directors, of its stockholders and of its policyholders voting at the meeting and of the Superintendent of Insurance, thus assuring that all interested parties would have a voice in the formulation of the plan. Upon the plan being so approved the stock of the company was deemed retired and canceled. Thus the statute provided for compulsory

cancellation of the stock. Disapproving stockholders and policyholders were given the right of a judicial review.

In 1911 this Section 95 was materially amended by Section 2 of Chapter 150, Laws of 1911. Section 95 as so amended is set forth in the opinion of the Trial Court (pp. 8a-9a).

Inasmuch as this Section 95 did nothing of itself and inasmuch as the plan for the acquisition of its own stock by the company provided only for the purchase of stock from those stockholders who voluntarily elected to sell their stock at the price and on the terms provided in the offer being made by the company in the plan, it was necessary to amend Section 16 of the Insurance Law. Section 16 provided the kinds of stocks and bonds in which an insurance company could invest its surplus funds. One sentence in this section prohibited any investment in its own stock. By Section 1 of Chapter 150, Laws of 1911, this section was amended (see opinion of Trial Court, pp. 9a-10a). The amendment consisted of the addition of the words commencing with the word "provided" at top of page 10a.

By Section 1 of Chapter 301, Laws of 1917, this Section was further amended by adding after the 1911 amendment the provisions which now appear in subsection 3 of Section 199 after the first sentence thereof. See page 34a. Subsection 2 of this statute made certain amendments to Section 95 which for the purposes of the issues here are unimportant and immaterial.

In 1939 there was a general revision of the Insurance Law. See Chapter 882, Laws of 1939. Section 95 of the former Insurance Law is now subsection 2 of Section 199. The amendment to Section 16 of the former Insurance Law made in 1911 is now the first sentence of subsection 3 of Section 199 and the balance of this subsection 3 is the amendment made in 1917 to former Section 16.

The Trial Court in its opinion said:

> "Mutualization as an organic structural change was possible under the law as it stood when the Farmers and Traders was incorporated. It has not been changed in any way by any of the amendments since 1911. The same safeguards that existed in 1911 exist in 1959. The same steps must be taken as in 1911." (p. 10a)

The appellants in their brief in the Court of Appeals said at bottom of page 37 thereof:

> "The Legislature combined the pertinent provisions of former Sections 16 and 95 of the Insurance Law, as above stated, by the Laws 1939, Chap. 882, and the same is now Sec. 199 of the Insurance Law, • • •."

And at bottom of page 68:

> "• • • The changes made by Chap. 882 Laws of 1939 and Chap. 708, Laws 1955 now Sec. 199 do not basically change the principles involved and for the purposes of this litigation are substantially the same as the Laws of 1917."

It thus appears that the provisions in the plan of mutualization of Farmers and Traders for the acquisition of its own stock were pursuant to statutes in existence when the Company was organized.

The Questions Which Appellants in Their Notice of Appeal and Jurisdictional Statement State Are Presented by This Appeal Do Not Present a Substantial Federal Question

On pages 3 and 4 of their jurisdictional statement appellants list the three questions which they state are presented by this appeal. The same three questions are listed in the notice of appeal.

Question 1

Question 1 is not an interpretation of Section 2 of Section 199. It is appellants' present interpretation of the provisions in the plan of mutualization for the acquisition by the Company of shares of its own stock from such shareholders as voluntarily elect to accept the offer to buy made in the plan.

Subsection 2 in and of itself does nothing to the Company or its stockholders or its policyholders. It, as did Section 95 under the 1911 amendment, merely authorizes a domestic stock life insurance company which desires to become a mutual life insurance company to "formulate and carry out a plan for the acquisition by it of its outstanding capital stock, as follows: . . ." The price and terms upon which its stock was to be acquired were left entirely to the ability of the interested parties, directors, stockholders, policyholders and the Superintendent of Insurance, to reach an agreement. The plan authorized by subsection 2 of Section 199 (former Section 95) does not constitute a contract between the company and any of its stockholders. It merely is a continuing offer by the company to its stockholders to purchase shares of stock when, as and if any stockholder voluntarily elects to accept the offer. When any stockholder elects to accept the offer by surrendering his shares and accept the down payment and a mutualization certificate as provided in the plan, then a binding contract, a sale, is made between him and the company. This contract does not, in any way affect the rights of any other stockholder and cannot and does not constitute a taking of property.

The company becomes obligated to complete payments of the purchase price to the stockholder who elects to turn in his stock when and as the earnings from the nonparticipating business are realized. This is the proper

interpretation of the plan and the contract made when the stockholder elects to accept the offer made therein. This is the interpretation which appellants themselves placed upon the transaction in all their briefs in the courts of the State of New York. For example, on page 83 of their brief in the Appellate Division they state:

> "The Superintendent of Insurance under Sec. 199 (2) (f) and also the prior Law, Sec. 16, Chap. 150, Laws 1911 and Chap. 301, Laws 1917, was first required to determine that the surplus being used to buy stock was not required for the security of the then existing policyholders. Here, the Superintendent has made that determination and thus the purchase was proper."

On page 69 of their brief in the Court of Appeals:

> "Plaintiffs do not claim that the Company had no power to buy the stock."

Speaking of what resulted when the stockholders who had elected to accept the offer, did turn in their stock, they said on page 84 of their brief in the Appellate Division and repeated on page 70 of their brief in the Court of Appeals:

> "In any event, these stockholders who sold out, of course, cannot complain. They made a 'sale'. They were sufficiently warned by Plaintiff Young and the 'sale' was nevertheless acceptable to them. The 'sale' has been closed."

See subdivisions (a) to (m), (p), (q) and (u) of judgment.

The election to accept the offer contained in the plan to buy shares of stock being a matter which each stockholder had the right to elect, entirely at his own discretion, it was not necessary either for Section 199 or the plan to provide for any right of appraisal or judicial hearing.

The Trial Court in its opinion said:

> "Again this court reiterates that no stockholder is compelled to sell his stock under the provisions of section 199 of the Insurance Law. That is entirely in the discretion of the owner of the stock. There being no compulsory taking, there is no confiscation" (p. 15a).

As for those stockholders who of their own free will chose not to accept the offer in the plan but to retain their stock, they retained their shares with all the rights thereof as hereinbefore outlined.

Again we repeat that all stockholders of Farmers and Traders who ever acquired a share of stock acquired and held their shares subject to the constitutional right of the Company under statutes in existence when the Company was organized to switch from writing non-participating policies to writing participating policies and to make an offer to purchase its shares of stock from such stockholders as elected to accept the offer, all in the process of converting itself from a stock life insurance company to a mutual life insurance company in accordance with the declared public policy of the state.

There is no merit or substance to appellants' contention in their Question 1.

Question 2

At bottom of page 13 of their jurisdictional statement appellants admit that by the 1911 amendment of former Section 95 all compulsory requirements of the section (now subsection 2 of Section 199) were eliminated. They argue, however, that by the 1939 amendment to subsection 2 providing that if the plan specifies the purchase price to be paid by the company the price so specified should be adhered to, the compulsory features of the old 1906

statute were restored, thus forcing stockholders to sell their stock (see top p. 14a of appellants' jurisdictional statement). The Revision Note with respect to this amendment reads:

> "Subsection 2 is substantially the same as former §95, with a few changes. It seems desirable to have the price paid for shares either one fixed in advance and adhered to, or one approved by the superintendent as reasonable. Otherwise a few shareholders can practice a hold-up."

The simple and complete answer to the contention of appellants in this Question 2 is that the Court of Appeals of the State of New York has declared that under Section 199 and the plan of mutualization of Farmers and Traders each stockholder had the free and uncontrolled election to retain his shares or surrender them and be paid the mutualization price. See subdivisions (n) and (o) in declaratory judgment at page 21a. The contention appellants are now making is a pure afterthought because, as has heretofore been pointed out, the appellants in their brief in the Court of Appeals stated that subsections 2 and 3 of Section 199 were substantially the same as former Section 16 and 95.

Furthermore, as the cases presently to be cited will show, the amendment to Section 199 made in 1939 was certainly constitutional, authorized and valid under the reserved power of the Legislature to alter and amend charters.

Appellees also submit that the 1939 amendment that the mutualization price should be adhered to is beneficial, not harmful, to appellants. Keeping down the price to be paid to those stockholders who choose to sell their stock as provided in the plan means just so much more of the earnings from the non-participating business will be available for payment of dividends in which the appel-

lants will share on a pro rata basis so long as they elect to retain their stock.

There is no merit or substance to appellants' contentions in Question 2.

Question 3

This involves the 1917 amendment to Section 16 of the former Insurance Law, now everything in subsection 3 of Section 199 after the first sentence. In the plan of mutualization there are provisions (Articles V and VII) that the shares of stock purchased by the Company from the shareholders who elect to sell their stock shall be transferred into the name of the three named "Mutualization Trustees." This was done. The Mutualization Trustees have voted the shares so transferred into their names and have received dividends declared on these shares for the purposes stated in subsection 3 (I-447, 456, 462).

Such provisions of the mutualization plan and such acts are the only provisions and the only acts done by the appellees which are not pursuant to statutes in existence at the time Farmers and Traders was incorporated. In other words, except for this single item, all the provisions of the declaratory judgment rest upon an adequate non-federal basis. Appellees also maintain that the matters involved in Question 3 also rest on a non-federal basis, and, if this is not so, Question 3 certainly does not present a substantial federal question.

The arguments made and the cases cited on page 20 of appellants' jurisdictional statement present no federal or constitutional question. Whether the stock purchased by the Company pursuant to the plan becomes "treasury shares" in the sense that these shares could not be voted and no dividends could be paid thereon is purely a matter of New York statutory corporate law. By this 1917 amend-

ment the Legislature created a special kind of a voting trust. There could be no doubt that it had a right so to do and, having spoken, this special trust is legal. See *Matter of Morse (Bank of America)*, 247 N. Y. 290, at page 298.

The Court of Appeals of the State of New York has declared in the judgment appealed from that the transfer of the shares to the Mutualization Trustees is valid and effective, that said trustees have the right to vote the shares and receive dividends thereon for the benefit of policyholders entitled to share in the profits. See subdivisions (v), (w), (x), (y) and (z) of the judgment (pp. 24a-25a).

By presenting this Question 3 the real objective of the appellants is revealed. They seek complete control of this $40,000,000 company. The Company has 3,000 shares outstanding. On December 31, 1957, 2,784 shares (a few more since) had been transferred to the Mutualization Trustees. This left 216 shares not transferred. Of these plaintiffs own 157 shares. Plaintiffs are seeking a judgment that only these 216 shares can vote and receive dividends. That would put them in absolute control of the Company.

Such contention not only does the utmost violence to the unambiguous provisions of the 1917 amendment, but also to the entire spirit and purpose of the mutualization statutes. It is contrary to the declared public policy of New York State.

What did this 1917 amendment do to the shares of stockholders who elected to retain their shares? Not a thing. Each share of stock held by the appellants since the approval of the plan has exactly the same voting rights and the same rights to dividends and to share in the surplus of the Company as it had before the plan became effective. All the 1917 amendment did was to remove by express

language any possibility of a shareholder who elected not to turn in his shares successfully contending that his shares alone could vote and receive dividends.

Appellees therefore submit that, entirely apart from the constitutional right of the Legislature to adopt this 1917 amendment under its reserved power to amend, the amendment did not violate any constitutional rights of the appellants. A law which does not change by an iota rights is plainly constitutional.

The Trial Court based its decision holding that the 1917 amendment was not unconstitutional as to appellants on the ground that they had not proved that their shares had not come from the increased 1,000 shares authorized in 1919 (bottom p. 12a and top of p. 13a).

The Court in its opinion also held that under the constitutional and statutory reserved power in the Legislature to alter and repeal the charter of any corporation this 1917 amendment violated no constitutional rights of any stockholder of Farmers and Traders (see particularly top of p. 12a and bottom of p. 16a).

In the Court of Appeals appellees argued that, considering the legislative history and purposes of the mutualization statutes, a Court would have held that under the above-recited 1911 amendment to Section 16 the shares of stock acquired by the Company could have been voted and dividends received thereon. All that the 1917 amendment did was to make explicit what was implicit in the 1911 amendment.

Appellees therefore submit that even with respect to the voting of and receipt of dividends on the shares of stock acquired by the Company, the judgment appealed from rests on an adequate non-federal basis.

If this be not so, there cannot be the slightest doubt that under the reserved power to amend or repeal the

Legislature had the right to pass the 1917 amendment and such amendment violates no constitutional rights of the appellants.

The Revised Statutes, passed in 1827, provided that (1 R. S. 600, §8):

> "The charter of every corporation, that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

That reservation now appears in Section 5 of the General Corporation Law, as follows:

> "§5. Alteration and repeal of charter.
>
> "The charter of every corporation shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

The New York State Constitution, as adopted in 1846, and also as revised in 1894, provided that (N. Y. Const. of 1846, Art. 8, §1; N. Y. Const. of 1894, Art. 8, §1):

> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The New York State Constitution still contains exactly the same provision, but now in Article 10, Section 1.

In addition to the cases cited in the opinion of the Trial Court we cite the following cases of this Court:

Sherman v. Smith, 1 Black 587, 17 L. Ed. 163.

Sherman was a stockholder of a bank incorporated in 1844 under the Banking Law of New York. The law then

provided that no stockholder of any bank should be liable for any of its debts. It also provided that the Legislature might at any time alter or repeal the act. In 1849 the Legislature passed an act making each stockholder liable ratably in proportion to his stock for the debts of the bank. This Court held the 1849 act constitutional.

Miller v. State of New York, 82 U. S. 478, 15 Wall. 478, 21 L. Ed. 98.

A railroad corporation was incorporated under an act passed in 1850. Power was given to the City of Rochester to elect four of the thirteen directors and to the other stockholders to elect the remaining nine. Later an act was passed giving the City of Rochester power to elect seven of the thirteen directors, with the other stockholders electing only six directors. Held, that the second act was constitutional under the reserved power in the Legislature to amend.

Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21.

Under the charter of the Michigan Mutual Life Insurance Company and the laws in existence at the time it was incorporated each qualified stockholder of the insurance company had one vote for each share of stock owned by him. Some fifteen years after it was incorporated Michigan, under the reserved power to amend, passed a law giving a shareholder the right to vote his shares cumulatively for directors. Held, the amending act was constitutional.

It should be noted that in each of the above cases the rights of the shareholders were drastically altered, whereas in the present case the rights of plaintiffs as stockholders of Farmers and Traders are not changed at all.

Appellees do not deem it necessary to comment on the cases cited by appellants other than to say that, in their opinion, none of such cases, except *Lord v. Equitable Life*

Assurance Society, 194 N. Y. 212, is in point. With such exception, none of appellants' cases is a case where (1) the plaintiff was a stockholder, (2) at the time of the incorporation of the corporation involved there were in existence statutes on the same general subject matter as the amending statute claimed to be unconstitutional, and (3) the amending statute, passed under the reserved power in the Legislature to amend, merely implemented or clarified the statute in existence at the time of incorporation.

In the *Lord* case the statute being attacked was one of the mutualization statutes adopted in 1906. It greatly diluted the voting power of the stockholders. It is now subsection 1 of Section 199. It was held constitutional. See pages 230-238 of 194 N. Y.

There is no merit or substance to appellants' contentions in Question 3.

The Court will note appellees pleaded several affirmative defenses (I 236-336). The State Courts did not find it necessary to pass upon these in view of the disposition which they made of appellants' case.

Appellees respectfully submit:

(1) That the appeal herein presents no substantial federal question;

(2) That the judgment appealed from rests on an adequate non-federal basis; and

(3) That the appeal should therefore be dismissed.

Respectfully submitted,

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